

# Food & Beverage

## LITIGATION UPDATE

Issue 273 • August 29, 2008

### Table of Contents

#### Legislation, Regulations and Standards

- [1] USDA Proposes Rule Banning Slaughter of All Downer Cattle .....1
- [2] FAS Report Examines Regulation Changes Applicable to U.S. Exports .....1
- [3] FSIS Announces Public Meeting to Discuss Beef Irradiation .....2
- [4] EFSA Begins Health Claim Assessment Process .....2
- [5] Alabama Institutes Higher Health Insurance Premiums for Obese State Employees ...2
- [6] California Assembly Passes Legislation Banning Carcinogen from Food Packaging ...3

#### Litigation

- [7] Bush Administration Requests WTO Dispute Panel to Resolve GM Issues .....3
- [8] Listeria Outbreak in Canada Generates Class Action Claims .....4

#### Other Developments

- [9] Dairy Groups Weigh Consumer Concerns over rBGH .....4
- [10] Nutritionists Challenge Salad Bar Super-Sizing .....5
- [11] Survey Shows U.S. Consumers Worried About Food Safety .....5
- [12] Marion Nestle, *Pet Food Politics: The Chihuahua in the Coal Mine*, University of California Press, September 2008 .....5
- [13] WSJ Reports on Cost-Conscious Food Product Changes .....6
- [14] Highly Caffeinated “Cocaine” Beverage Hits UK Markets .....6

#### Media Coverage

- [15] Emily Bryson York, “Does Marketing Contribute to Obesity in African-Americans? Study Indicates It Does, but Economic, Cultural Factors Also to Blame,” *Advertising Age*, August 27, 2008 .....7
- [16] Vegetarian TV Ad Dramatizes Colon Cancer Risks of Processed Meats .....7

#### Scientific/Technical Items

- [17] Study Links MSG Consumption to Obesity .....8

Shook,  
Hardy &  
Bacon L.L.P.®

[www.shb.com](http://www.shb.com)

# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture

##### [1] USDA Proposes Rule Banning Slaughter of All Downer Cattle

USDA this week announced a proposed rule that would “amend the [federal] meat inspection regulations to initiate a complete ban on the slaughter of cattle that become non-ambulatory after initial inspection by Food Safety and Inspection Service (FSIS) inspection program personnel.” The proposed rule would end the current practice of determining on a case-by-case basis whether these “downer” cattle are fit for human consumption. Cattle that become non-ambulatory and disabled from an acute injury after ante-mortem inspection would not proceed to slaughter as “U.S. Suspects,” but would receive the designation “U.S. condemned” indicating that they are banned from the human food supply. In addition, the proposed regulation would require facilities to report these cases to FSIS inspectors and veterinarians, which in 2007 approved only 1,000 “re-inspected” downer cows or less than 0.003 percent of cattle slaughtered annually.

USDA Secretary Ed Schafer stated that the proposed changes aim to “maintain consumer confidence in the food supply, eliminate further misunderstanding of the rule and, ultimately, to

make a positive impact on the humane handling of cattle.” The agency will accept comments until September 29, 2008. See *USDA Press Release*, August 27, 2008.

##### [2] FAS Report Examines Regulation Changes Applicable to U.S. Exports

The USDA Foreign Agricultural Service (FAS) has reportedly told U.S. exporters that new Hong Kong food labeling regulations could affect thousands of products in the health, organic and snack food industries. Hong Kong’s Legislative Council earlier this year announced that as of January 1, 2010, all prepackaged food sold in the region must display energy content as well as the amount of protein, carbohydrates, fat, saturated fat, *trans* fat, sodium, and sugars per serving. These rules are stricter than Codex recommendations and pose a unique problem for U.S. manufacturers, which must now translate U.S. thresholds, such as those for “low fat” products, into Hong Kong standards. In addition, some major retailers are threatening to turn away non-compliant goods as early as July 2009. “While the U.S. requires the labeling of 15 nutrients plus energy, products manufactured for the U.S. do not meet with the Hong Kong nutrition labeling requirements due to different nutrient definitions, rounding practices, and recommendations for daily consumption,” according to the FAS report. “The trade estimates the impact of the regulation will be a significant reduction in the variety of goods in the market, especially new-to-market products.” See *AP-Foodtechnology.com*, August 25, 2008.



### [3] FSIS Announces Public Meeting to Discuss Beef Irradiation

USDA's Food Safety and Inspection Service (FSIS) has [announced](#) a public meeting to address a 2005 [petition](#) submitted by the American Meat Institute (AMI) asking the agency "to recognize the use of low penetration and low dose electron beam irradiation on the surface of chilled beef carcasses as a processing aid." Slated for September 18, 2008, in Washington, D.C., the meeting will include opening remarks by USDA Under Secretary for Food Safety Richard Raymond and a scientific survey presented by a member of the FSIS Office of Policy and Program Development's Risk Management Division. Stakeholders and other members of the public can register for the meeting on the FSIS [Web site](#).

## European Food Safety Authority (EFSA)

### [4] EFSA Begins Health Claim Assessment Process

EFSA's Panel on Dietetic Products, Nutrition and Allergies (NDA) this month began a new process for reviewing health claim assessments, rejecting seven of the first eight applications submitted for approval. The agency's role, according to a EFSA, is to "verify whether the health claim is substantiated by scientific evidence, delivering its opinion within 5 months of validating the applications received." Claims under NDA jurisdiction include those pertaining to disease reduction, children's health and development, and generic nutrition. To gain approval for health claims, manufacturers must sufficiently define or characterize the product as well as provide evidence supporting a causal link between the product and the desired health benefit. EFSA said that it has already gathered 220 applica-

tions, which the agency will publish on its Web site after verifying that submissions are complete. See *EFSA Press Release*, August 21, 2008.

The European Responsible Nutritional Alliance (ERNA), however, has argued that the "substance characterization" requirements may not be appropriate for all products. In particular, ERNA pointed to dossiers submitted by the Irish National Dairy Council, which sought to link dairy product consumption to ideal body weight and reduced dental cavities in children. NDA rejected the petition in part because the council failed to adequately define the dairy products under consideration. The decision raised concerns that NDA will bar health claims for similarly generic substances, such as fruits and vegetables, since these foods are not easily characterized. "This will come as a shock to industry and a blow to companies that have had their applications rejected. The potential economic damage is vast," an ERNA spokesperson was quoted as saying. "These opinions make it clear it is not going to be easy for companies to have claims approved." See *Food Production Daily.com*, August 27, 2008.

## State and Local Governments

### [5] Alabama Institutes Higher Health Insurance Premiums for Obese State Employees

Alabama's State Employees Insurance Board recently announced plans to charge some obese state workers an extra \$25 per month for health insurance starting in January 2011. Alabama already levies a \$25 per month insurance surcharge for smokers. Next year the state will require additional medical screening for several metabolic indicators, including body mass index, cholesterol, glucose, and blood pressure. Employees who exhibit



multiple risk factors will have one year to improve their overall health profile before the state begins assessing the insurance surcharge. Alabama will also offer discounts and incentives to join programs like Weight Watchers and YMCA exercise programs. “Our goal was to make our members aware of those risk factors,” said Deborah Unger, clinical director for the insurance board. “As long as you are aware and are doing something to correct it, there won’t be a fee. We either do something to control claims costs or you pay the premium anyway.”

Critics of the so-called “fat tax” have reportedly countered that punitive measures are not as effective as incentive-based agendas. Jeffrey Levi, executive director of Trust for America’s Health, argued that the surcharge punishes people genetically predisposed to extra weight or high cholesterol. “We need to realize the complexity of these things,” Levi was quoted as saying. “Just addressing this through the health care system is insufficient. What are we doing about the workplace environment? What’s served in the state cafeterias and hospitals? We need to do the voluntary things first for people to be able to make health choices before forcing punitive measures.” *See WebMD Health News* and *The Los Angeles Times*, August 25, 2008.

#### [6] **California Assembly Passes Legislation Banning Carcinogen from Food Packaging**

The California State Assembly, by a 42-29 majority vote, has approved legislation (S.B. 1313) that would amend the state’s health and safety code by banning the use of certain perfluorinated compounds in concentrations above 10 parts per billion in food containers. Additional information about the proposal appears in issue 269 of this Update. The bill was defeated the previous week,

but, on reconsideration, the Assembly removed text that required manufacturers to “use the least toxic alternatives” when they substitute chemicals that provide stain- and grease-proof properties like the perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) compounds currently in use in microwave popcorn bags and candy wrappers. These substances are apparently present in the blood of all newborns as well as in 98 percent of American adults tested. PFOA has purportedly been found to cause breast and testicular cancer. The amended bill must be approved by the state Senate and signed into law by Governor Arnold Schwarzenegger (R). *See Product Liability Law360*, August 28, 2008.

## Litigation

#### [7] **Bush Administration Requests WTO Dispute Panel to Resolve GM Issues**

Unable to resolve differences with the European Union (EU) over its import moratorium on genetically modified (GM) crops, the U.S. government has apparently requested the formation of a World Trade Organization (WTO) dispute panel. The United States, Canada and Argentina have been working since June 2008 to reach an agreement with the EU in the matter. U.S. Trade Representative Robert Zoellick reportedly noted that the Bush administration had no choice but to bring the matter before the WTO, stating “This trade barrier harms farmers and consumers around the world by denying them the benefits of productive, nutritious and environmentally friendly biotech products.”

The United States indicated that it would bring a WTO case in May, but could not file a trade complaint until informal consultations were



completed. The panel formation request will start a briefing, oral argument and appeals process that is expected to take 18 months. If the United States prevails, the EU will either be forced to allow GM crop imports or pay compensation. Alternatively, the United States and its partners to the dispute would be allowed to impose trade sanctions equal to the amount of lost GM crop sales. *See Truth About Trade & Technology*, August 20, 2008.

#### [8] **Listeria Outbreak in Canada Generates Class Action Claims**

According to a news source, Canadians sickened by a national outbreak of the *Listeria monocytogenes* bacteria from contaminated meat products have begun filing class-action lawsuits against Maple Leaf Foods, Inc. Claims are reportedly pending against the company in several provinces. Its chief executive has apparently said that Maple Leaf is fully accountable for the outbreak, which has been linked to 15 deaths. “The buck stops right here,” he was quoted as saying. “We have excellent systems and processes in place but this week it’s our best efforts that failed—not the regulators, not the Canadian food safety system. I emphasize this is our accountability and it’s ours to fix, which we are taking on fully.” The Merchant Law Group in Calgary is reportedly representing some of the plaintiffs. *See Calgary Herald*, August 27, 2008.

## Other Developments

#### [9] **Dairy Groups Weigh Consumer Concerns over rBGH**

The International Dairy Federation (IDF) has reportedly backed the use of recombinant bovine growth hormone (rBGH or rBST) to increase the

milk supply, but warned that the industry must do more to prove any benefits to consumers. IDF spokesperson Jim Begg told *DairyReporter.com* that “It is crucial that any new technology has the support of consumers if it is to be successful.” He also noted that other global sectors, including India, have successfully boosted milk production by improving animal diets and overall health. “Globally, it is by focusing on the nutritional requirements of cattle that we will raise milk production,” Begg was quoted as saying.

The International Dairy Foods Association (IDFA), however, has since stated that it supports the use of “no-rBST” labels on milk products despite attempts by some states to prohibit such claims. “Many dairy processors are offering products made with milk from cows not treated with rBST, and they make that clear with production claims on their product labels,” the association said. “The claims simply provide information that consumers want, they do not reflect any health or safety issues.”

The continuing debate has also drawn publicity to Eli Lilly and Co.’s acquisition of Monsanto’s leading rBGH product, Prolisac®. The consumer group Food & Water Watch responded to the purchase by launching a campaign to “Tell Eli Lilly that consumers want rBGH-free milk, and they want it labeled.” “Not surprisingly, Eli Lilly is now spreading the same misinformation about rBGH’s safety and environmental benefits as Monsanto once did,” the watchdog asserted. “It’s a questionable technology that has been shunned by several major dairy retailers this year alone.” *See DairyReporter.com* and *Food & Water Watch Press Release*, August 27, 2008.



### [10] Nutritionists Challenge Salad Bar Super-Sizing

According to health professionals and nutritionists, salad bar offerings, even those at organic and natural groceries, can vastly exceed recommended allotments of calories, fat and sodium. Focusing on Whole Foods, which provides customers with salad bar containers in several sizes, a recent *New York Sun* article observes that even when the smaller-sized container was half-filled with some items, such as Southern Sweet Potato Salad, Chicken Provencal or Vegan Peach BBQ Tofu Salad, excessive sodium and fat would be consumed in a single serving. Cardiac surgeon Mehmet Oz, who frequently appears on “The Oprah Winfrey Show,” contends that most people fill their containers. “Visually, you’d want to fill the space,” he said. Oz claims that he rarely visits buffets and warns that regular consumption of fatty meals will damage the arteries.

A Whole Foods spokesperson said that the store offers choices and self-service. “You take as much or as little as you want,” he stated. The grocery’s customers are provided “with foods that are healthful foods, that adhere to our stringent quality standards.” As for container sizes, the spokesperson noted, “They can be used for one person or multiple people. People should still control their serving sizes to maintain a healthy diet.” Center for Science in the Public Interest Executive Director Michael Jacobsen characterized Whole Foods this way: “They talk about natural, or organic, or vegetarian, or vegan. Sometimes a lot of their products truly are healthy, and a lot of them truly are not.” See *The New York Sun*, August 25, 2008.

### [11] Survey Shows U.S. Consumers Worried About Food Safety

The Center for Food Integrity has released preliminary results of a survey that shows U.S. consumers are more concerned about food safety than they are about global warming or the war in Iraq. Fewer than 20 percent of those surveyed strongly agreed that the government is doing a good job to ensure the food we eat is safe. The survey was conducted by Gestalt Inc.; full survey results will be made available during the center’s 2008 Food System Summit, October 8-9, 2008, in Indianapolis. The [Center for Food Integrity](#), located in Kansas City, Missouri, was formed in 2007 to increase consumer confidence in the U.S. food system. Its member organizations include a variety of stakeholder interests, including farmers, ranchers, food processors, and government.

### [12] Marion Nestle, *Pet Food Politics: The Chihuahua in the Coal Mine*, University of California Press, September 2008

Nutritionist and New York University Professor Marion Nestle has authored a new book that details the 2007 pet food recalls from the first phone calls in the United States about sick cats to a compromised supply chain in China that eventually triggered international concerns about the safety of imported foods, toothpaste, tires, toys, and animal feed. The book’s contents outline the sequence of events in the pet food crisis and discuss the companies involved, the search for what was causing pets to get sick and die, and the food safety systems in China and the United States. According to restaurateur Alice Waters, who reviewed the book, “Marion Nestle . . . explains what the industrialization of the food supply in this country has done to both the taste and the safety of the foods we eat.”



### [13] *WSJ* Reports on Cost-Conscious Food Product Changes

Food manufacturers are apparently trying to beat the higher costs of transportation and raw ingredients by “adding fillers and substituting cheaper ingredients,” says *Wall Street Journal* reporter Julie Jargon. Noting that vegetable oil is finding its way into chocolates, fewer ingredients are being included in some packaged foods, walnuts are replacing pecans, and soy protein is finding its way into many more products, the article notes that some manufacturers are also raising some prices and cutting product sizes. Other companies are reportedly changing product names to make cheap cuts of meat, for example, sound like more expensive ones. Thus, “Miranda” steak is actually flank steak, “Marbello” steak is skirt steak, and “Cordelico” steak is flap meat. Even restaurants are getting into the act, substituting some products for others and experimenting with smaller portions or fewer ingredients. While nutritionists note that some exchanges could enhance the overall nutrition of a product, others can reduce levels of beneficial vitamins and minerals. See *The Wall Street Journal*, August 23, 2008.

### [14] Highly Caffeinated “Cocaine” Beverage Hits UK Markets

The energy beverage Cocaine made its debut this month in the United Kingdom, where politicians and consumer groups debated the purported impact of high-caffeine products on public health. Although some government officials have publicly criticized such products, health experts have noted that Cocaine, which is manufactured by Los Vegas-based Redux Beverages, falls within safety guidelines for high-caffeine products and does not contain either taurine or glucuronolactone. In addi-

tion, the European Food Safety Authority (EFSA), which later this year will review both taurine or glucuronolactone, said it has no plans to revise its caffeine guidelines. EFSA currently requires beverages not labeled coffee or tea that contain more than 150 mg/l of caffeine to warn consumers of their “high caffeine content.” See *Food Navigator-USA.com*, August 26, 2008.

In a related development, *Legal Newsline* has reported that some attorneys believe the next major tort lawsuits will focus on “Big Caffeine.” According to Timothy Sandefur, a lawyer with the Sacramento-based public interest group Pacific Legal Foundation, “It’s a product that, just like tobacco, can be portrayed as some kind of diabolical thing being used against innocent people by wealthy corporations.” Sandefur likened the potential for caffeine torts to current litigation against gun makers, lead paint companies and fast food restaurants in which plaintiff’s attorneys leverage public nuisance laws for monetary gain at the expense of significant health or safety reforms. “If you said in 1970 or 1980, that people are going to bring enormous lawsuits against tobacco companies, accuse them of fooling people into smoking cigarettes and then use that as a pretext to take a lot of money from them to run government programs, people would have laughed at you,” Sandefur was quoted as saying.

Northwestern University Law Professor James Speta, however, voiced more faith in the tort system to deter frivolous lawsuits. “The crux of cases that tend to be successful are allegations that a manufacturer engaged in deliberate deception or in an outright failure to warn about harmful side effects that they knew about,” said Speta. “There are a number of cases in which those allegations have been proved or were serious enough to result in a settle-



ment. As to public nuisance, with very few exceptions, the courts have not accepted public nuisance theories where there is an allegation that a product is harmful." See *Legal Newline.com*, August 24, 2008.

## Media Coverage

**[15] Emily Bryson York, "Does Marketing Contribute to Obesity in African-Americans? Study Indicates It Does, but Economic, Cultural Factors Also to Blame," *Advertising Age*, August 27, 2008**

This article follows the latest developments in a growing "body of statistical data suggesting that the black community has been left behind on the road to healthier-food marketing." In particular, *Advertising Age* writer Emily Bryson York focuses on the efforts of researchers funded by a five-year, \$4.5 million grant from the Robert Wood Johnson Foundation to study obesity prevention in African-American children. Led by Sonya Grier of American University's Kogod School of Business, the new research "may be the first comprehensive look at food marketing to blacks, considering the types of products offered to a market, promotions, advertising and other communications, distributions and availability of specific products and price," according to York.

Grier published the first results of her research in the September 2008 issue of the *American Journal of Public Health*, where she looked at advertising studies conducted between 1992 and 2006 and examined how foods and beverages were marketed to both black and white demographics. While Grier reportedly acknowledged that economic, environmental and cultural factors all play a part in public health, she also advised food manufacturers to reex-

amine their marketing practices in African-American communities. "Companies are constantly changing marketing strategies over social concerns about healthy eating," Grier was quoted as saying. "We don't see that with the same frequency or fanfare in terms of targeted marketing to African-Americans, and all we're suggesting is there needs to be a more balanced approach to create a healthier food environment for African-Americans."

**[16] Vegetarian TV Ad Dramatizes Colon Cancer Risks of Processed Meats**

A television advertisement slated to be shown in Chicago and Denver in September 2008 reportedly depicts young children eating hot dogs and lamenting their development of "late-stage colon cancer." While the children do not have cancer, the Physicians Committee for Responsible Medicine, which sponsored the ad, calls it "a way to raise appropriate concern about a deadly concern." Health issues stem from the high fat and salt content in processed meats, such as hot dogs, and their commonly added preservatives and color enhancers, that is, sodium nitrate and nitrite, which have allegedly been linked to the development of cancer in animals.

Hot dogs, which can contain pig snouts and stomachs, cow lips and livers, goat gullets and lamb spleens, are apparently eaten more than occasionally in the United States, with consumers spending more than \$4 billion on hot dogs and sausages in 2007. According to one researcher, eating one hot dog a day for several years can increase the number of Americans who develop colorectal cancer from 50 per 100,000 to 60 per 100,000. The increased risk of occasional consumption is reportedly too small to be quantified. See *Associated Press*, August 26 and 28, 2008.





## Scientific/Technical Items

### [17] Study Links MSG Consumption to Obesity

A recent study has reportedly linked monosodium glutamate (MSG) consumption to increased body weight. Ka He, et al., "Association of Monosodium Glutamate Intake with Overweight in Chinese Adults: The INTERMAP Study", *Obesity*, August 2008. Researchers from the University of North Carolina School of Public Health monitored the MSG intake of 752 healthy Chinese volunteers between the ages of 40 and 59. All of the participants cooked at home and avoided processed foods, but 82 percent regularly used MSG in food preparation. Those in the latter group apparently had an average body mass index of 23.5 kilograms per square meter, while the non-MSG users had an average BMI of 22.3 kg/m<sup>2</sup>. In addition, the study purportedly found that one-third of the people who used the most MSG were three times as likely to be overweight, with a BMI exceeding 25. "We saw the risk even when we controlled for physical activity, total calorie intake and other possible explanations for body mass. The positive associations between MSG intake and overweight were consistent with data from animal studies," lead author Ka He was quoted as saying. See *The New York Times*, August 26, 2008; *Food Navigator-Europe.com*, August 28, 2008.



---

# Food & Beverage

## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by  
Leo Dreyer and Mary Boyd in the Kansas City office of SHB.  
If you have questions about the Update or would like to receive back-up materials,  
please contact us by e-mail at [ldreyer@shb.com](mailto:ldreyer@shb.com) or [mboyd@shb.com](mailto:mboyd@shb.com).  
You can also reach us at 816-474-6550.  
We welcome any leads on new developments in this emerging area of litigation.

**Shook,  
Hardy &  
Bacon** L.L.P.®



**Geneva, Switzerland**

**Houston, Texas**

**Kansas City, Missouri**

**London, United Kingdom**

**Miami, Florida**

**Orange County, California**

**San Francisco, California**

**Tampa, Florida**

**Washington, D.C.**

---